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WILL THE FEDERAL COURTS OF APPEALS SURVIVE UNTIL 1984? AN ESSAY ON DELEGATION AND SPECIALIZATION OF THE JUDICIAL FUNCTION*

RICHARD A. POSNER†

I have to begin by apologizing for my title. I know it is frivolous. Its purpose is to attract attention—or rather to deflect attention from the disinal subject matter of this paper, which is the growing workload of the federal courts of appeals and its implications for two important but drably technical issues in the administration of those courts: the delegation of the judicial function to law clerks and staff attorneys, and the creation of specialized courts of appeals. I also want to be one of the last people to be able to use 1984 as the symbol of an apocalyptic future.

I. THE CASELOAD CRISIS

In the year that ended on June 30, 1981, the number of appeals filed in the federal courts of appeals increased by 13.6 percent over the number filed in the previous fiscal year. It is now 58.3 percent higher than it was as recently as 1975, and more than 400 percent higher than it was

* Presented as the 1982 Justice Lester W. Roth Lecture on Trial and Appellate Advocacy, October 14, 1982, at the University of Southern California Law Center. I had thought the allusion in my title was obvious but one of my readers disagrees; it is, of course, to the book by Andrei Analrik, *Will the Soviet Union Survive Until 1984?*

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in 1960.¹ If this rate of increase continues, and results in a proportionate increase in the number of judges, eventually there will be as many federal court of appeals judges as there are traffic court judges today. Of course, things are unlikely to be allowed to reach that pass, even if the caseload continues to increase rapidly, which is uncertain.² There is general recognition today that there is a natural upper limit on the number of federal court of appeals judges and that we are either near, or have already exceeded, that limit. The limit is a function of transaction costs and of geography. It is widely believed, and the experience of the Ninth Circuit with its twenty-three active circuit judges offers no contrary evidence, that the largest number of judges that is consistent with an appellate court's maintaining reasonable cohesion is nine,³ a number already exceeded in more than half of the circuits,⁴ that dividing a state between two circuits would cause great confusion (a state statute could be constitutional in one part of the state and unconstitutional in another), and that increasing the number of circuits without dividing a state, namely California, though it could be accomplished by reconstituting the present circuits (a very messy business, be it noted), would greatly increase the number of intercircuit conflicts and hence add to the already heavy workload of the Supreme Court.

I expect an argument only with respect to my (unoriginal) suggestion that nine is the upper limit for the number of appellate judges in a circuit. Why nine? Why not eleven, or for that matter twenty-three? The reason is that nine seems to be the largest number of judges that can deliberate in judicial fashion on a case; with a larger number, the deliberation begins to resemble that of a legislative body.⁵ Although federal circuit judges sit in three-judge panels, the occasional en banc

1. See AD. OFF. OF THE U.S. CTS., REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, H.R. DOC. NO. 117, 97th Cong., 1st Sess. 123 (1981) [hereinafter cited as 1981 ANN. REP.].

2. In the most recent fiscal year, which ended June 30, 1982, the number of appeals filed were "only" 6% above the previous year's total. See DIRECTOR OF THE AD. OFF. OF THE U.S. CTS., MANAGEMENT STATISTICS FOR THE UNITED STATES COURTS, at United States Courts of Appeals National Judicial Workload Profile (1982) [hereinafter cited as MANAGEMENT STATISTICS FOR THE UNITED STATES COURTS].

3. See, e.g., AD. OFF. OF THE U.S. CTS., REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, (1964) ("The Committee . . . reported that . . . nine is the maximum number of active judgeship positions which can be allotted to a court of appeals without impairing the efficiency of its operation and its unity as a judicial institution.").

4. See 676 F.2d VII, VII-XXVI (1982).

5. See P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 161-63 (1976) [hereinafter cited as JUSTICE ON APPEAL]; Betten, *Institutional Reform in the Federal Courts*, 52 IND. L.J. 63, 78-79 (1976); Meador, *The Federal Judiciary—Inflation, Malfunction, and a Proposed Course of Action*, 1981 B.Y.U. L. REV. 617, 643-44.

rehearing is indispensable to maintaining a reasonable uniformity of federal law within the circuit—unless the Supreme Court takes over the role of maintaining intracircuit as well as intercircuit uniformity, which of course it does not have the time to do. Thus, if there are too many judges in a circuit to meet comfortably en banc, the circuit is apt to degenerate into a “judicial Tower of Babel.”⁶

Of course, we could have two tiers of circuit judges—those eligible to sit en banc, and those not.⁷ We already have this system, de facto, because today a large fraction of the panels in the federal courts of appeals include a district judge or other visitor, or a senior circuit judge of the circuit, and none of these is eligible to sit en banc. (This has been changed as of October 1, 1982, to allow a senior circuit judge to sit en banc to review the decision of a panel of which he was a member.⁸ One wonders whether this change—really just a restoration of the former practice—was made with any forethought for the effect, slight though it may be, on the en banc procedure as a means of maintaining intracircuit uniformity.) I am not sure this is the worst of all possible ways to cope with the caseload crisis, so long as some neutral criterion such as seniority is used to determine eligibility for sitting en banc, though it could be a fertile source of personal tensions among circuit judges, and (if seniority were the criterion) would have the curious effect of preventing an incoming Administration from directly filling any vacancies in the senior tier of federal judges below the Supreme Court.

But even if the limiting factors I have mentioned can be overcome in this or other ways, that would not really clear the way to increasing the number of circuit judges; for increasing their number would, by increasing the number of court of appeals decisions, add to the workload of the Supreme Court, eventually necessitating the creation, in one form or another, of additional Supreme Courts (which might, of course, require amending article III of the Constitution).

So even if you, the reader, do not worry about diluting the prestige and power of the individual circuit judge by multiplying the number of such judges—and you are less likely to worry about this than I, unless you happen to be a circuit judge, too—we must, after all these years of crying wolf, *really* be at or near (or, quite possibly, above) the ceiling

6. Meador, *supra* note 5, at 642.

7. See, e.g., JUSTICE ON APPEAL, *supra* note 5, at 203-04. The Ninth Circuit, pursuant to Pub. L. 95-486, § 6, 92 Stat. 1629, 1633 (1978), has been experimenting recently with divisional en bancs—a kind of halfway house to splitting that circuit.

8. See Federal Courts Improvement Act of 1982, tit. II, § 205, Pub. L. No. 97-164, 96 Stat. 53, amending 28 U.S.C. § 46(c) (Supp. IV 1980).

on the number of circuit judges. The question is, what is to be done, assuming the caseload continues to grow? There is of course no good reason to believe it *will* continue to grow at the same rate as it has in the past two decades,⁹ though we cannot make good predictions because there is no good theory of caseload growth. But unless the caseload does not grow at all, or declines, it is just a matter of time before it will be pressing hard against the ceiling—not a precise number, but if I am correct a real constraint—on the number of circuit judges, if it is not doing so already.

Now all this talk of ceilings and crises, you may say, rests on an assumption that I have not even tried to defend: that a reduction in the quality of federal appellate justice from present levels is a matter of grave concern. The average quality of many products and services has decreased over time as a function of mass production and consumption. If federal justice has at last been placed into mass production—if more and more people enjoy access to the federal courts—should we not accept the decline in the average quality of those courts as the inevitable concomitant of moving from an elite to a mass provision of judicial services? To answer this question adequately would carry me far beyond the intended scope of this paper, but a brief answer is the following. In the ordinary economic marketplace, different levels of quality can coexist: Rolls Royces and Pintos, fine wines and cheap wines, mansions and condos. So although the average quality of a product may fall as it becomes more and more widely available, consumers of high quality are not necessarily denied their preference. There is no corresponding market mechanism for providing different quality levels of judicial services. Some crude differentiation is attempted through the rules of jurisdiction, in particular those that set minimum amount in controversy requirements, such as \$10,000 to invoke the diversity jurisdiction of the federal courts, or that give a court (such as the U.S. Supreme Court) discretion as to what cases it will hear. In one sense this paper is about the kinds of additional differentiation that might be adopted to allow the federal courts to continue to dispense a high quality of justice. I merely assume there is a social demand for this level of quality; but I assert with confidence that there is no market to assure that this demand will be supplied, and that therefore the issue of optimal quality is an appropriate one for collective social choice.

Assuming, then, that there really is a federal appellate caseload

9. For some obviously inadequate evidence that the caseload increase may be tapering off, see MANAGEMENT STATISTICS FOR THE UNITED STATES COURTS, *supra* note 2.

crisis, there are all sorts of ways of dealing with it besides increasing the number of appellate judges and thereby, if I am right, seriously degrading the quality of federal appellate justice. They include: queuing—that is, making appellants wait longer for oral argument and for a decision; reducing the fraction of cases in which oral argument is granted; disposing of a bigger fraction of appeals without a published opinion; making greater use of the pecuniary sanctions provided by Rule 38 of the Federal Rules of Appellate Procedure for groundless appeals; making greater use of injunctions against “problem” litigants (some obviously insane) who deluge the courts with hundreds of frivolous motions and appeals; freezing the number of district judges; delegating more of the judicial function to law clerks and staff attorneys; and greater judicial specialization. None of these is a panacea; some may be as bad as adding more appellate judges.

I shall discuss just the last three in this list of methods of dealing with caseload growth. And my discussion will be incomplete in a more profound sense, because I have excluded from the list itself the two solutions to the caseload crisis that I consider the best: creating pecuniary disincentives to bringing (or defending) unmeritorious cases, by adopting the English and Continental rule that the losing party in a lawsuit must reimburse the winning party’s legal fees; and reducing the scope of federal law, by returning more regulatory responsibilities to the states, by construing the Constitution more narrowly, and by reducing the federal statutory postconviction remedies. But these are long-term reforms. They are highly controversial, and offensive in whole or part to powerful vested interests. The solutions to the caseload problem that I shall discuss are a sample of the less controversial, less far-reaching, seemingly more attainable.

The first solution I shall discuss, but only very briefly, is to stop creating new federal district judgeships. The proximate cause of the unusual increase in the number of appeals filed in the federal courts of appeals last year (1981) was the appointment two years previously of a very large number of federal district judges to newly created judgeships.¹⁰ Freezing the number of district judges would probably stop further growth of the appellate caseload in its tracks. The federal district judges’ workload has reached the saturation point. They cannot

10. Pursuant to the Omnibus Judgeship Act of 1978, 28 U.S.C. § 133 (1978), the number of federal district judges rose from 384 in 1978 to 484 in 1980, an increase of 26%. See 1981 ANN. REP., *supra* note 1, at 125. In the same period, the number of civil case terminations by the district courts increased by 27%. See *id.* at 126.

dispose of more cases than they do now, other than by forcing litigants to settle, or by forcing plaintiffs through discouragement to abandon their suits (or never bring them), and these modes of disposition are not appealable.

If the number of appealable decisions at the district court level can thus be frozen by freezing the number of district court judgeships, the only thing that could cause the appellate caseload to rise would be an increase in the percentage of district court decisions appealed. This figure *seems*—I cannot put it more strongly than this—to remain fairly stable over long periods of time.¹¹ It is of course possible that if the district judges are busier their decisions will be less careful and that this will result in a higher rate of appeals. But the district judges cannot be any busier than they are if, as I have stated, they have already reached the saturation point in their caseload. The chief effect of any further increase in the district court caseload will then be to lengthen the queue rather than to reduce the amount of time the judge spends on the cases he does decide. But I may be exaggerating. A heavier caseload may induce a district judge to spend more time encouraging settlement, leaving him less time to work on litigated cases; or he may try to limit the growth of his queue by spending less time on each litigated case; or he may delegate more of the judicial function to law clerks and externs. This last possibility could have deleterious consequences that I am about to discuss in the case of circuit judges, and in the district court context could include stimulating more appeals by generating more mistakes.

Nevertheless, I suspect that freezing the number of district judges would be a relatively effective method of limiting the growth of the circuit judges' caseload. That does not mean it would be a good

11. Remarkably there are no regularly compiled statistics on the appeal rate in the federal courts. See Howard & Goldman, *The Variety of Litigant Demand in Three United States Courts of Appeals*, 47 GEO. WASH. L. REV. 223, 225-27 (1978). An unpublished study by Goldman shows a slight growth in the appeal rate, from 19% to 23%, between 1951 and 1960, and a bigger jump, to 28%, in 1970. See J. Goldman, *Measuring a Rate of Appeal* 8, table II (Oct. 9, 1973) (Fed. Jud. Center). He did not report data for intervening years in the 1960's, or for any years after 1970. See *id.* A study of the appeal rate in cases actually tried in the period 1976-79 found the rate to be only 24%. See G. Bermant, J. Cecil, A. Chaset, E. Lind & P. Lombard, *Protracted Civil Trials: Views from the Bench and the Bar* 41, table 6 (Aug. 1981) (Fed. Jud. Center). But as this is the appeal rate only from judgments after trial and not from all final dispositions, it is not strictly comparable to the Goldman study. Logically, though, one would expect a higher rate of appeal from judgments entered after a trial than from those concluded by summary disposition. Cases that go to trial tend to involve higher stakes than cases that do not, which makes it more likely that the parties will be willing to bear the additional costs of an appeal. An important limitation in both studies should be noted: they were confined to civil cases.

method; it is very crude, and would be greatly resented—understandably—by most district judges. It would interact with the Speedy Trial Act¹² to produce one particularly dismal result: civil cases would be pushed to the back of a lengthening queue. If the number of criminal cases continued to increase, eventually district judges might be spending all their time trying criminal cases—the civil queue would be infinite. If for no other reason, the solution of freezing the number of district judges is strictly a stopgap measure. Yet it is the simplest, and at least in the short run, the cheapest solution. It is, as it were, the path of least resistance for those desperately concerned with the caseload crisis, and so might as well be put on the table.

II. DELEGATION OF JUDICIAL POWERS TO LAW CLERKS AND STAFF ATTORNEYS

A. LAW CLERKS

Federal circuit judges today are entitled to have three law clerks and associate justices of the Supreme Court are entitled to four; most judges and justices take up their full entitlement. In addition, the courts of appeals have staff attorneys, who are like law clerks but are hired by the court rather than by the individual judge and are not assigned, except on an ad hoc basis, to individual judges. There is a newly imposed ceiling of no more staff attorneys than there are judges;¹³ most circuits are, I believe, at or near the ceiling. Therefore, if we lump together law clerks and staff attorneys (I shall later offer some reasons against doing so, however), the ratio of authorized legal assistants to circuit judges is about four to one; as recently as 1969 it was one to one.¹⁴

I want to consider what difference it makes whether a court of appeals judge has one law clerk or several. If he has just one, problems of supervision and delegation (which are reciprocals of one another) are unlikely to be serious; it is easy enough to keep track of what one law clerk is doing. But if he has several law clerks a significant amount of his time must be spent supervising and coordinating their work.¹⁵ Additional secretarial assistance becomes necessary. The judge now finds himself presiding over a staff. As more of his time becomes taken up

12. Speedy Trial Act of 1974, ch. 208, 88 Stat. 2076 (1975) (codified as amended at 18 U.S.C. § 3161 (1976 & Supp. IV 1980)).

13. See 1981 ANN. REP., *supra* note 1, at 69-70.

14. See J. OAKLEY & R. THOMPSON, LAW CLERKS AND THE JUDICIAL PROCESS 20 n.2.53 (1980).

15. Like most of the points made in this paper, this one is not new. See JUSTICE ON APPEAL, *supra* note 5, at 45-46.

with supervision and coordination of a staff, leaving less time for his conventional judicial duties, more of his judicial responsibilities must be delegated to the staff; and the increase in delegation, by making the selection of new law clerks a more consequential decision, in turn requires the judge to spend more time on that dimension of his administrative responsibilities. All of this comes at a time when the nondelegable judicial duties of circuit judges—reading briefs, hearing oral arguments, conferring with other judges to decide the cases heard—are increasing apace as part of the caseload growth noted earlier in this paper. About the only “give” is in the time the judge devotes to the actual preparation of his opinions, and it is here that one would expect the greatest delegation of judicial responsibilities to staff to occur.

I do not want to be understood as suggesting that the process of delegation to law clerks and staff attorneys has reached the point where the decisional function itself has been delegated. The judiciary is not yet a bureaucracy, but it seems inevitable that as the ratio of law clerks to judges grows, more and more of the initial opinion-drafting responsibility will be delegated to law clerks, increasingly transforming the judge from a draftsman to an editor. Judging from the length, scholarly apparatus, style, and tone of Supreme Court opinions in recent years, this process of transformation is all but complete in that august body. One would expect the justices to lead the circuit judges in this regard not only because each justice has more clerks, but also because the ratio of law clerks to opinions is so much higher in the Supreme Court than in the circuit courts. The average justice writes about fifteen or sixteen¹⁶ majority opinions a year, for which he has the assistance of four law clerks; the average circuit judge writes more than thirty such opinions¹⁷ and has the assistance of only three law clerks. Of course, the differences in the organization and functions of the two types of court make this comparison problematic. The Supreme Court justices have a big screening function to perform, which the circuit judges do not, and the Supreme Court's cases are substantially more difficult on average than the courts of appeals'. But, on the other hand, the justices also have the benefit of a previous appellate opinion in every case, the luxury of choosing which cases to hear (which enables them to steer clear of many messy cases, with big records, that the

16. See 1981 ANN. REP., *supra* note 1, at 345.

17. Oddly, this is not a published figure, but computed for me by the Statistical Analysis and Reports Division of the Administrative Office of the United States Courts. See Letter from James A. McCafferty, Sept. 30, 1982 (copy on file with the *Southern California Law Review*).

courts of appeals cannot refuse to hear), more experienced law clerks, and, on average, better briefs, because lawyers take a case in the Supreme Court more seriously than a case in a court of appeals. In addition, the figure I gave for circuit opinions refers only to signed, published opinions, and an equal or greater number of cases are disposed of today without a published opinion but often with an unpublished order nearly as elaborate and as time-consuming to prepare. (In the Seventh Circuit, no appeal is decided without some written statement of reasons.)

I hope that no one thinks that by talking openly of the role of law clerks as drafters of judicial opinions I am letting the world in on some guilty secret of the judges. Although for a long time the polite fiction was maintained that law clerks were merely "go-fers" and "sounding boards," that time is past, and the role of law clerks in opinion writing is now discussed openly, as it should be in a government that claims to rule by consent rather than by mystery. In an article published almost ten years ago, a state supreme court justice wrote: "Opinion writing by law clerks is certainly so widespread today that no symposium devoted to the duties of law clerks would be complete without some discussion of the subject."¹⁸ Archibald Cox wrote recently of the "increasing use of law clerks who write opinions to justify their [Supreme Court] Justices' votes,"¹⁹ and added: "Because each Justice has a number of law clerks and typically none serves more than one or two years, a heroic effort by a Justice would be required to impart unity of philosophy and authorship to the law clerks' drafts."²⁰ Professor Philip Kurland says that "more and more [Supreme Court] opinions are written by the law clerks rather than their justices,"²¹ and Joseph Vining reports that Supreme Court "clerks routinely now say in private that they were the ghostwriters of one or another important opinion and that it was published with hardly a change"²² And when circuit judges had only two law clerks, District Judge (now Circuit Judge) Alvin Rubin asked:

What are these able, intelligent, mostly young people doing?

18. Smith, *A Primer of Opinion Writing for Law Clerks*, 26 VAND. L. REV. 1203, 1203 (1973). I am grateful to Dennis Hutchinson for the references in this footnote and in *infra* notes 19-20 and 23-24.

19. A. COX, FREEDOM OF EXPRESSION 88 (1981).

20. *Id.*

21. Kurland, Book Review, 47 U. CHI. L. REV. 185, 197-98 (1979).

22. Vining, *Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 248, 252 (1981). For vigorous rebuttal to Vining's criticism of the contemporary role of law clerks, see Edwards, *A Judge's View on Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 259 (1981).

Surely not merely running citations in *Shepard's* and shelving the judge's law books. They are, in many situations, "para-judges." In some instances, it is to be feared, they are indeed invisible judges, for there are appellate judges whose literary style appears to change annually.²³

Judge Rubin is also the coauthor of the *Law Clerk Handbook*,²⁴ which is published by the Federal Judicial Center for use in the federal courts and which contains the statement: "[T]he appellate court clerk's function, in its simplest terms, is to research the issues of law and fact in an appeal and to draft a working opinion for the judge, pursuant to his directions."²⁵

The fact that a law clerk writes an opinion draft does not, of course, measure his impact on the opinion that is eventually published. There is not only the judge's contribution as editor to be considered, but also the marching orders that he gives the law clerk before the latter sits down to write. The structure, the ideas, even the style of the opinion may be the judge's, although much of the actual drafting is the law clerk's.²⁶ But I think it is generally true that whoever does the basic drafting of a document—a judicial opinion or anything else—will have a big impact on the product, viewed not as the judicial decision itself, which as I have said is securely the judge's, but as the opinion.

Opinions drafted by law clerks tend to differ from opinions written by judges along several dimensions, of which lack of an individual style (*pace* Judge Rubin) is too obvious to require mention. I shall discuss four others.

1. *Length*. Opinions by law clerks are invariably longer. This is partly because the law clerk has more time to write than the judge (since there are more law clerks than there are judges and since the

23. Rubin, *Views from the Lower Court*, 23 U.C.L.A. L. REV. 448, 456 (1976).

24. A. DiLeo & A. Rubin, *LAW CLERK HANDBOOK: A HANDBOOK FOR FEDERAL DISTRICT AND APPELLATE COURT LAW CLERKS* (1977).

25. *Id.* § 1.200.

26. Although I cannot vouch for the accuracy of a quotation appearing in a newspaper article, I cannot resist sharing the recent newspaper account of a federal district judge who "uses clerks to draft opinions after instructing them how the case is to come out. 'Basically I hum them a tune and ask them to write me a song for it. In the meantime I can still be in court.'" Doherty, *Law Clerks: Major Influence Behind Scenes*, Boston Globe, Sept. 5, 1982, at 15, col. 1. Another district judge is reported in this article to have:

said the writing skills of his clerks are impressive. "There are instances when I don't change a word. I may publish something exactly as they put it out. If, however, I think it is too long or too short, doesn't have the proper language, or comes to the wrong result, ultimately it is my responsibility, so I'll make changes."

Id.

judges have many calls on their time that law clerks do not have), and partly because, as a recent and academically distinguished student, the law clerk may write more easily than the judge; but mainly it is because the law clerk does not know what he can leave out. Not being the judge, he is unsure what facts and reasons are essential and he tends naturally to err on the side of overinclusion. And since he is not an experienced lawyer, many things are new and fresh to him that are old hat to his judge, other judges, and other readers of the opinion, most of whom will be specialists.

2. *Candor*. Almost every appellate case worth deciding in a published opinion involves some novelty and hence cannot be decided by a mere recitation of authority. But 200 years after Blackstone described the judges of the common law as "the living oracles" of the law,²⁷ which is to say mere transmitters, timid jurists continue pretending that there is no such thing as a new case, a case of first impression; that there are just new applications of settled principles. Now law clerks are inevitably timid jurists (and we can all be grateful for that). They do everything they can to conceal novelty and to disguise imagination as deduction. Hence the heavy reliance in opinions drafted by law clerks on string citations for obvious propositions (where they are superfluous) and novel propositions (for which they are inaccurate), on quotations (too often wrenched out of context) from prior opinions, on canons of statutory construction that were long ago exploded as mere clichés,²⁸ on truisms, on adjectives, and on boilerplate of every sort. To pare down such an opinion in search of the hard analytical core is too often like peeling an onion.

I admit that the particular deformities just discussed—prolixity and lack of candor—are older than the era of law clerks. Here is one of Wigmore's criticisms of judicial opinions, made many years before law clerks played a significant role in opinion drafting:

The opinions often give the strong impression of being discoveries by the judges,—discoveries, that is, of what *they* never knew before. The opinion exhibits conscientiously the mental lucubrations experienced in making this discovery. The lengthy opinions redundantly quote well-settled platitudes from earlier opinions,—re-proving old truths, which are apparently new and therefore interesting to the writers. Many opinions read, in effect, as follows: 'The learned counsel for the defendant is in error in arguing that 2 and 2 make 5.

27. W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (1st ed. Oxford 1765).

28. See H. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, in BENCHMARKS 196 (1967); K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 521 (1960).

The weight of authority (and we frankly state that this view seems to us more reasonable) holds that 2 and 2 are 4. In Chancellor Kent's Commentaries, book III, page etc. In Smith on Receivers, § 1, it is stated, etc. We quote a few leading opinions, etc. The Supreme Court of Alabama as far back as *Brown v. Jones*, 24 Ala., said: "2 and 2 have always been held to make 4". We are therefore constrained to hold etc.²⁹

Not only do these vices precede the era of numerous law clerks, but they are controllable to a very considerable extent—and very often are controlled—by the judge in his role as editor. If you will dip at random into the *Federal Reporter*, *Second* of recent years you will find that most opinions still are short, though this statement can no longer be made for the Supreme Court. Yet, as I said earlier, the initial draftsman of a judicial opinion, as of any document, is likely to have a big impact on the final product, despite conscientious attention by the judge to his editorial responsibility. Therefore, prolixity and lack of candor can be assumed to be greater problems not than they once were (brevity and candor are more highly valued qualities of expression today than they were fifty or one hundred years ago), but than they would be today if law clerks played a smaller role in judicial opinion writing than they do.

Need I add that prolixity and lack of candor are problems, and not mere inelegances, in judicial opinions? They increase the time required for reading an opinion—and most of the readers of judicial opinions are people whose time is highly valuable—and they reduce the usefulness of an opinion as a guide to what the judges are likely to do in future cases.

3. *Research*. Opinions drafted by law clerks are apt to make an ostentatious display of the characteristic apparatus of legal scholarship—string citations, copious footnotes, abundant references to secondary literature. Yet such opinions may actually be less thoroughly researched than opinions written by judges because the time required to write the opinion draft presses on the time that the law clerk would otherwise have to do the research for the draft. If a circuit judge divides up the initial drafting of all his sixty-odd published and unpublished opinions among three law clerks, the bulk of each clerk's time is going to be taken up with opinion writing. And it is not to be supposed that while this is going on the judge is sitting hunched at the LEXIS

29. 1 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 8a, at 244 (3d ed. 1940), *quoted in* R. LEFLAR, APPELLATE JUDICIAL OPINIONS 151 (1974).

terminal, doing the original research for the opinion. He is busy supervising and editing. If the law clerks do not do the original research none will get done. If they lack the time they will have to depend on the briefs and, at least at the court of appeals level, this will mean, all too often, dependence on inadequate research by the lawyers.

4. *Credibility*. The more that lawyers and especially other judges regard judicial opinions as authentic expressions of what the judges think, the more they will rely on judicial opinions for guidance and authority. No doubt a brilliant opinion written by a law clerk, and acknowledged as such by the judge in the first footnote of the opinion, would have a certain authority by virtue of its intrinsic quality, in the same way that some books and law review articles have authority with judges. But this kind of authority is different and normally less than the authority of an opinion known to reflect the thinking of the people who are doing the deciding and who will continue to do so long after this law clerk has left. The more the thinking embodied in opinions is done by law clerks rather than by judges, the less authority opinions will have.

I can perhaps make this point clearer by bringing out an ambiguity in the term "holding." It is used in a very narrow sense to mean the minimum rule that can be extracted from the opinion. In this sense we might say that the holding of Justice Douglas' opinion for the Supreme Court in *Griswold v. Connecticut*³⁰ is that states may not forbid married couples to use contraceptives. But the term is also used more broadly to describe the reasoning in the opinion that a majority of the Court thought essential to the decision. In this sense the holding of *Griswold v. Connecticut* is that the Bill of Rights, read as a whole, creates a right to make certain intimate choices—including, of course, but not necessarily limited to, a right of married people to decide whether to engage in sexual intercourse for reproduction or for pleasure—which the state may not interfere with. "Holding" in this broader sense is whatever is not "dictum," regarded as anything in the opinion that the judges did not consider essential to their result.³¹

As I said earlier, the decisional process is still securely the judge's despite the growing ratio of law clerks to judges; hence the authority of the narrow holding in judicial decisions is unthreatened. But the broader holding depends critically on the structure and texture and

30. 381 U.S. 479, 480-86 (1965).

31. See H. FRIENDLY, *In Praise of Erie—And of the New Federal Common Law*, in BENCHMARKS 155, 158 n.15 (1967).

tone of the opinion itself, as distinct from the narrow holding which depends on just the facts and the outcome. The more it is sensed that the opinion is the work of the law clerk, the less attention judges and lawyers will pay to the broad holding. This will reduce the authority of judicial decisions as sources of legal guidance and will increase uncertainty and litigation. The depressing feedback effect that can be foreseen from the higher rates of litigation caused by a decline in the authority of judicial opinions is, of course, a demand for more law clerks. And that is the fundamental reason why I do not think that increased delegation of the judicial function to law clerks and staff attorneys is the answer to the caseload problem in the courts of appeals.

But I want to emphasize the word "increased" in the last sentence. I am not prepared to argue that the present level of delegation is excessive, and I point out in this connection that the symbiosis of old judges and young law clerks is not so unnatural as it seems, even when it results in a substantial delegation of opinion writing to the young. Observing judges like Holmes and Hand, not to mention innumerable practitioners, carrying on their professional activities well into their eighties with no perceptible flagging of powers, we are apt to think of law in general, and judging in particular, as an old man's game. But it is also a young man's (and, need one add today?, woman's) game as well. The fact that most of the legal journals in the country are controlled and managed entirely by law students should tell us something about the age of maturation for important lawyer skills. It is also a fact that law clerks can be, and for the most part are, selected on the basis of their ability to do legal research, analysis, and writing. The criteria for selection of circuit judges have never been so limited. So I am not arguing that judges who delegate much of the opinion-writing function to their law clerks need to apologize for doing so; I am arguing that this delegation has costs as well as benefits, and in particular that the costs of *additional* delegation would exceed any increment in benefits from it.

B. STAFF ATTORNEYS

It used to be the practice at the federal administrative agencies to have a centralized opinion-writing staff, rather than for the individual commissioners each to have his own law clerks. This practice was much criticized and these staffs have tended in recent years to be replaced with law clerks on the judicial model. With lovely irony this movement has intersected a contrary movement in the state and federal appellate courts: the growth—called "cancerous" in a recent article by Wade

McCree that sounds theines much like those in this paper³²—of central staffs composed of what are called staff attorneys.³³ While staff attorneys have other assignments besides opinion drafting (notably assisting the judges with motions matters—a function that the staff attorneys in the Seventh Circuit, at least, perform with the highest competence), and while most of their drafting is of unpublished opinions which are rarely cited as precedents and which typically, by rule of the circuit, may not be so cited, at least within the circuit,³⁴ today some published court of appeals opinions are initially drafted by a staff attorney rather than by a judge or by one of his law clerks.³⁵

Three of the tendencies that I discussed above in connection with opinion writing by law clerks—prolixity, lack of candor, and lack of authenticity—are aggravated when opinion-writing responsibilities are assigned to staff attorneys, even when the staff attorneys are just as good as the regular law clerks. Because the staff attorney is not selected by the individual judge, he owes his loyalty to the court as a whole (perhaps too indistinct an entity to command much loyalty), rather than to the individual judge to whom he is from time to time assigned. There can be no assurance that the staff attorney will share the outlook and values of that judge, and he will not have a chance to acquire that outlook and those values, or at least understand them sympathetically, by working intimately with the same judge over a period of months or years. For these reasons the staff attorney will ordinarily be less able to function effectively as a judge's alter ego for opinion writing than will the law clerks whom the judge picks himself—giving due regard to compatibility of outlook and values as well as intellectual ability—and works with on a continuous rather than intermittent basis.

III. OF JUDICIAL SPECIALIZATION AND SPECIALIZED FEDERAL COURTS

A. THE DRIFT TOWARD SPECIALIZATION

The second alternative to freezing judgeships as a method of limiting the caseload of the federal courts of appeals that I want to examine in

32. McCree, *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 787 (1981).

33. See, e.g., D. MEADOR, *APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME* (1974).

34. See, e.g., 7TH CIR. R. 35.

35. See, e.g., Ubell, *Report on Central Staff Attorney's Offices in the United States Courts of Appeals*, 87 F.R.D. 253, 289 (1980).

this paper is greater specialization.³⁶ Judge Friendly, in an article written when he was a recently appointed circuit judge reflecting on the transition from practice to judging, devoted a good deal of space to the question of specialization;³⁷ and I now realize that it is a natural area of speculation for a fledgling federal judge, as I still am. For most lawyers, whether they come out of practice like Judge Friendly or the academy like me, to become a federal judge is to go from being a specialist to being a generalist. Yet we live in an age of specialization, forecast by Adam Smith's analysis of the division of labor³⁸ and ringingly endorsed by his successors, the modern economists, who tell us with great truth that specialization enables society to get more output at lower cost from its limited stock of resources.³⁹ The implications for the survival of the federal courts in the form in which we know them, in an age of increasing scarcity of judicial resources, are ominous.

The new United States Court of Appeals for the Federal Circuit (as of October 1, 1982) combines the Court of Claims and the Court of Customs and Patent Appeals and, in addition, has exclusive appellate jurisdiction of patent infringement cases and exclusive review jurisdiction of Federal Merit Systems Protection Board cases.⁴⁰ It is a portent, though a slightly ambiguous one, of growing specialization in the federal judicial system. A merger of existing specialized courts, the new court will actually be less specialized than either of its predecessors. But it will be much more specialized than any of the regular federal courts of appeals, and its jurisdiction is being enlarged at their expense.

36. For an excellent overview of this subject, see Jordan, *Specialized Courts: A Choice?*, 76 Nw. U.L. REV. 745 (1981).

37. Friendly, *Reactions of a Lawyer-Newly-Become-Judge*, 71 YALE L.J. 218, 219-29 (1961), reprinted in H. FRIENDLY, *supra* note 28, at 1.

38. A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 3-22 (1937). Smith stated:

[T]he very different genius which appears to distinguish men of different professions . . . is not upon many occasions so much the cause, as the effect of the division of labour. . . . Among men . . . the most dissimilar geniuses are of use to one another; the different produces of their respective talents . . . being brought, as it were, into a common stock, where every man may purchase whatever part of the produce of other men's talents he has occasion for.

Id. at 15-16.

39. Oddly, the modern economic literature on specialization appears to be sparse and scattered. See G. BECKER, A TREATISE ON THE FAMILY ch. 2 (1981); G. STIGLER, *The Division of Labor is Limited by the Extent of the Market*, in THE ORGANIZATION OF INDUSTRY 129-41 (1968), reprinted from 59 J. POL. ECON. 185-93 (1951); Rosen, *Specialization and Human Capital*, forthcoming in J. LAB. ECON., and additional references therein.

40. See Federal Courts Improvement Act of 1982, Pub. L. 97-164, § 127(a), 96 Stat. 25, 37-38 (1982). For a more ambitious proposal, of which the new court can be regarded as a partial realization, see Haworth & Meador, *A Proposed New Federal Intermediate Appellate Court*, 12 U. MICH. J.L. REFORM 201, 210-34 (1978).

Patent infringement will become the most important area of specialized federal appellate jurisdiction we have ever had.

Another portent, though its relevance to my subject matter may not be immediately obvious, is the growing movement to abolish the diversity jurisdiction of the federal courts. To explain the relevance of this movement I must distinguish between judicial specialization and specialized courts. Of course the abolition of the diversity jurisdiction would not signify the creation of a specialized court; nor would it increase the specialization of the state courts. But it would increase the specialization of the federal courts, by shearing away the bulk (though not the entirety, as I shall have occasion to point out later) of their jurisdiction to decide state law questions. It will move them, perhaps decisively, in the direction of being specialized to the decision of questions of federal law. They will be less specialized than the new Federal Circuit court but more specialized than they are today.

B. IN DEFENSE OF THE GENERALIST APPELLATE JUDGE⁴¹

I am going to defend the generalist judge but my defense will be of a highly qualified sort. To begin with, it will be limited to the appellate judge. Some of what I say about specialization at the appellate level may have implications for the issue of specialization at the trial level but I will not try to draw them out in this paper; there are different tradeoffs which might warrant a different degree of specialization at the two levels, as in court of appeals review of Tax Court decisions. I do not want to be understood as recommending the abolition of the Tax Court or of probate courts!

Second, in evaluating the advantages and disadvantages of appellate specialization I shall take as given the existing structure of the American legal system onto which any additional specialized courts would be grafted. That is, I shall assume that the methods of educating lawyers, appointing judges, and conducting trials will remain fundamentally the same as they are today. This assumption is important because it is possible to conceive of the creation of a specialized judiciary as part of a more far-reaching reorganization of the American legal

41. For samples of earlier criticisms of specialized courts, many of them similar to mine, see COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 28-30 (1975); Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 68-74 (1975); Higginbotham, *Bureaucracy—The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261, 268 (1980); Rifkind, *A Special Court for Patent Litigation? The Danger of a Specialized Judiciary*, 37 A.B.A. J. 425, 425-26 (1951).

system. In Europe the judiciary is much more specialized than it is in this country;⁴² and I am not prepared to assert that that is a bad thing, given the very different structure of the Continental system. I have serious reservations, however, about trying to graft one branch of that system, namely the specialized judiciary, onto an alien trunk.

Third, in the interest of keeping this Article to a manageable length, I shall not consider the kind of intermediate specialization that consists of rotating judges among specialized divisions of their court, as is done, for example, in the circuit court of Cook County, Illinois. There have been proposals to do this in the federal courts of appeals,⁴³ but I shall not discuss them.

Fourth, I am going to assume that everyone knows what a specialized court is, and thereby conceal a significant ambiguity in the concept. The Tax Court, conventionally, is a specialized court; the National Labor Relations Board, conventionally, is an administrative agency. But an important method of increasing judicial specialization would be simply to reduce the scope of judicial review of agency action. The Labor Board exercises important adjudicative functions already, of course, but if the courts did not review Labor Board decisions, then the Board would be a full-fledged Labor Court, as well as an administrative agency. The narrower the scope of judicial review of agency action, the greater the delegation of judging to specialized tribunals, and the bigger the role of the specialized judiciary relative to the generalist judiciary. But this is an aspect or technique of specialization that I shall not discuss in this paper.

Finally, my criticism of judicial specialization starts from a recognition that the basic principle of specialization has not been rejected for our appellate judiciary. It is only one form of specialization, specialization of subject matter, that has been (largely) rejected. Our judges are specialized—to judging.⁴⁴ Familiar as this point is, it is hardly inevitable; federal appellate judging could be a part-time occupation, just as federal regulatory commissioners and most arbitrators are part-time judges. The functional specialization of the federal circuit judges has two implications for the question whether more subject-matter specialization would be a good idea. First, it is a partial answer to those

42. See, e.g., 1 *MANUAL OF GERMAN LAW* 36-41 (E. Cohn & W. Zdziebło 2d rev. ed. 1968).

43. See, e.g., Meador, *supra* note 5, at 645-46. For a good discussion of this and related alternatives to specialized courts, see JUSTICE ON APPEAL, *supra* note 5, at 169-84.

44. And, it goes without saying, to the law. On the question whether a judge should study related disciplines (e.g., penology), see the perceptive discussion and negative conclusion in P. DEVLIN, *The Judge as Sentencer*, in *THE JUDGE* 18-53 (1979).

nonjudges—practitioners or law professors specializing in one or at most two fields of law—who, reflecting on their own ability to master additional fields, dismiss out of hand the possibility that a federal judge could have an adequate working knowledge of even a significant fraction of the fields in which he is required to decide cases. A federal court of appeals judge spends essentially all of his professional time deciding appeals. The distractions that reduce the amount of time the successful practitioner or law professor spends reading and writing and thinking about law to a small fraction of the working day—travel and committee work and holding hands with clients or with students—are things from which federal court of appeals judges are very largely free, with the important—potentially, the devastating—exception, noted earlier, of time spent supervising and coordinating a staff of legal and clerical assistants. With rare exceptions no federal judge will know an area of substantive law as well as its foremost practitioners and scholars, but he will know more than busy practitioners and scholars think he could know who imagine trying to cram more study time into their crowded days. And he will have a skill at judging that comes from long practice in evaluating arguments of counsel, decisions of trial judges, and trial records and that is a legitimate fruit of specialization in the function of appellate judging.

Another implication of what I have called specialization of function concerns job satisfaction, and in turn the caliber of people willing to accept appointment to the federal courts of appeals. One does not have to be a Marxist, steeped in notions of anomie and alienation, to realize that monotonous jobs are unfulfilling for many people, especially educated and intelligent people, and that the growth of specialization has given to many white-collar jobs a degree of monotony formerly found only on assembly lines. I have said that all a federal court of appeals judge does, essentially, is decide appeals; that means reading briefs and records, hearing oral arguments, conferring with other judges after the argument, preparing opinions, reviewing opinions prepared by the other judges on the panel, voting on petitions for rehearing—and little else. The activities I have just mentioned, repeated over and over and over again,⁴⁵ have about them an undeniable element of the monotonous. It is one reason that the courts of appeals and the Supreme Court continue to take a summer recess. But the recess would not be enough to save the job from being monotonous if the

45. In my first year on the Court of Appeals for the Seventh Circuit, I heard 240 oral arguments, which is about average.

subject matter were uniform. While there are able people who would like nothing better than to spend twenty or thirty years just judging appeals in tax or patent or social security or antitrust cases, I do not think it would be easy to maintain a high quality federal appeals bench on such a diet.

Nor is it an adequate reply that most good lawyers today are specialists. I repeat my distinction between specialization of function and specialization of subject matter. The antitrust lawyer specializes in one field of law but his daily rounds are more varied than those of the appellate judge—sometimes he is trying (more likely pretrying) a case, sometimes he is arguing an appeal, sometimes he is counseling a client. He does not “relate to” his field in a single way.

Granted, even if I am correct that a specialized appellate judiciary would attract, on average, somewhat less able lawyers than does a generalist judiciary, this does not prove that greater specialization would be bad, for there is frequently a tradeoff between ability and specialization. A person who does only one job may perform better than an abler person who divides his time among several jobs, none of which he learns to do really well. But I wonder how transferrable this insight is from the industrial, technical, and academic fields where it is conventionally articulated to appellate judging. It is easy to understand what is meant by someone who says he is a specialist in engineering or orthopaedic surgery or navigation or ancient Greek dialects, but what is a specialist in an ideology? It is a fact, perhaps an unhappy fact, that many areas of our law—I venture to suggest most of them—have a strong ideological cast. To say, for example, that Laurence Tribe or John Ely is a “specialist” in constitutional law has rather a special meaning. They are specialists in the sense that they know constitutional law much better than most scholars or practitioners. But very few people, even among those who take seriously the idea of dividing the Supreme Court into a constitutional and a nonconstitutional branch, would also want to fill the constitutional branch with people like Tribe and Ely *because* they are specialists in constitutional law. It would be like asking specialists in political science to govern us. We think of a specialist not just as someone who knows a lot about a subject, but as someone to whom we are willing to entrust important decisions about it that affect us. This willingness depends on a belief that the specialist is objective, in the sense that his judgment is independent of personal values that we may not share, and that is not a sense that most people have about experts in constitutional law.

To take a less dramatic but to me more familiar example, consider the implications of creating a specialized court to decide antitrust appeals. Antitrust is a forbidding field to the noninitiate. Its practitioners are experts, but are they objective? Antitrust theorists are divided today into three warring camps. One camp thinks the most important values that the antitrust laws are designed and should be interpreted to promote are social or political values having to do with decentralizing economic power and equalizing the distribution of wealth.⁴⁶ Between it and the two other camps, which are united in believing that the only proper goals of antitrust law are economic,⁴⁷ there is no common ground. And, as yet at least, there is no objective method of choosing between the economic and noneconomic approaches—it is a value choice. And within the economic camp there is a “Harvard School,” prone to find monopolistic practices, and a “Chicago School,” which believes the same practices to be for the most part procompetitive,⁴⁸ and again there is as yet no agreed-upon method for deciding which view is correct.

These cleavages, reflecting deeper and at the moment unbridgeable divisions in ethical, political, and economic thought, would not be eliminated by committing the decision of antitrust appeals to a specialized court. They would be exacerbated. A “camp” is more likely to gain the upper hand in a specialized court than in the entire federal court system or even in one circuit. This is not only because appointments to the specialized court would inevitably be made from the camps, but also because experts are more sensitive to the swings in professional opinion than an outsider, a generalist, would be. The appearance of uniform policy that would result from domination of the specialized court by one of the contending factions in antitrust policy would be an illusion. It would reflect power rather than consensus. A turn of the political wheel would bring another of the warring camps

46. See, e.g., Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979):

It is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws. By “political values,” I mean, first, a fear that excessive concentration of economic power will breed antidemocratic political pressures, and second, a desire to enhance individual and business freedom by reducing the range within which private discretion by a few in the economic sphere controls the welfare of all.

47. [B]oth the “Chicago” and “Harvard” schools [believe] that the major goals of antitrust relate to economic efficiency—to avoid the allocative inefficiencies of monopoly power, encourage efficiency and progressiveness in the use of resources, and perhaps, on fairness grounds, to maintain price close to cost in order to minimize unnecessary and undesirable accumulations of private wealth.

Id.

48. See Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

into temporary command. There would be rapid vacillation between extremes, rather than the glacial shifts characteristic of policy change in the federal courts of appeals. If antitrust were the domain of a specialized court we would have seen a much greater expansion in the scope and intrusiveness of antitrust policy in the 1960's and 1970's than in fact occurred, followed by a much more radical contraction in the 1980's than has occurred. The history of the Federal Trade Commission, which in part is a specialized antitrust court, provides some evidence of this. (Imagine the FTC with a monopoly of antitrust litigation and no fear of judicial review other than perhaps by another specialized antitrust court!) It is hard to believe that such abrupt swings in legal policy would be healthy.

I therefore question whether the usual arguments for the division of labor have much force applied to subject-matter specialization by courts, except in a handful of areas where the legal experts are generally accepted to be objective. Federal tax and government contract law may be such areas; the Tax Court and the Court of Claims are well regarded. But I doubt that patent law, where there is a deep cleavage, paralleling the cleavages in antitrust law, between those who believe that patent protection should be construed generously to create essential incentives to technological progress and those who believe that patent protection should be narrowly construed to accommodate the procompetitive policies of the antitrust laws, is such an area; nor is social security disability law, where there is a vast gulf between those who emphasize the humane and remedial objects of the law and those who are worried about fostering dependency and depleting the federal budget. These fields are divided over questions of value. Such questions cannot be answered by consulting an expert observer, neutrally deploying his value-free knowledge. That is *why* we call them questions of value rather than of fact.

To all this it may be replied that I have carefully selected those fields in which specialization probably would not work well because of a lack of professional consensus, and omitted the many where it would. But how many fields of law are there in America today in which there is a professional consensus on fundamental questions? Trusts and estates is one, but that is because it has somehow avoided getting tangled in the myriad social tensions of the day. I am surprised it has, and I wonder how long it will be before some enterprising radical legal scholar takes it upon himself to assault this traditional bulwark of the wealthy.

In contrast, torts, traditionally an area of state law but increasingly one of federal law as well (like trusts and estates), is, like antitrust, a field of ideological combat, in particular between those who favor contracting liability and those who favor expanding it. Similarly, bankruptcy is divided between pro-debtor and pro-creditor camps, criminal law between those who emphasize public safety and those who emphasize defendants' rights, and so forth. There is little communication across these divides, which mirror the larger tensions in our society between what are loosely referred to as "liberals" and "conservatives." We should not exaggerate the degree of consensus in American law of the present day.

I have argued that the advantages of subject-matter specialization are fewer in most areas of federal law than in the usual areas of human activity where the division of labor is practiced, and I have identified two drawbacks inherent in such specialization: a reduction in job satisfaction, implying a reduction in the caliber of judges, and greater instability in the law. But there are other drawbacks as well.

1. A specialized court will tend to be less independent of the political process than a generalist court because its work can be more effectively monitored and controlled by the political branches of government—that is, by the executive and legislative branches. It is easier to predict how someone will decide cases in his specialty than how he will decide cases across the board, so that if courts are specialized the officials who appoint judges will be better able to use the appointments process to determine the character and policies of the court. And the work of the court will be much easier for Congress to monitor, and, through the appropriations process, to control, if the court operates in a single field.

But my conclusion that a specialist court is likely⁴⁹ to be more political than a court of generalists must be qualified in an important respect. As Professor Landes and I have argued elsewhere, the more a court is subject to control by the political branches of government, the less it can be expected to carry out the will of an earlier Congress as embodied in the statutes which that Congress enacted, and the less durable therefore are the "deals" that special interest groups can make with Congress.⁵⁰ So in one sense the power of special interest groups is

49. I emphasize here, as throughout this paper, that I am discussing tendencies, and not asserting universal truths. I do not suggest that the Tax Court, for example, is a political court.

50. See Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. LAW & ECON. 875, 885-87 (1975).

diminished when the courts are dependent on the political branches. The choice is thus between two types of judicial independence: independence from the constellation of political interests that at any given time is dominant in Congress and the White House, and independence from the will of an earlier Congress as expressed in legislation. I offer no view on which type of independence is "better" but note that the former probably reduces the impact of interest groups on public policy more than the latter. Congress' ability to project its will into the future through legislation that must be interpreted by judges is limited anyway, by the fact that, in performing their interpretive function, the judges, however conscientious they are about ascertaining and carrying out the will of the enacting Congress without regard to their personal values and policy preferences, are largely limited to public materials—the language of the statute, committee reports, the other conventional aids to construction—in ascertaining that will. And since the public materials invariably seek to muffle rather than to flaunt the degree to which the legislation is actually designed to advance the selfish interests of one group in the society, the process of judicial construction tends to give legislation a more public-spirited cast than the legislators actually intended.⁵¹

To be sure, the fact that an independent judiciary will tend on balance to reduce the scope of special interest politics in American life and that a generalist judiciary will be more independent than a specialist one is an argument against specialization only if it is desirable to limit the play of interest group politics in our society. That is a large question on which, again, I express no opinion; but for those who share the misgivings of the founding fathers about the effect on the formation of public policy of what they called factions,⁵² and what we now call special interest groups, it is an argument against specialization, and I shall leave it at that.

2. In suggesting that the independence of the judiciary from the other branches of government is less when the judiciary is specialized by subject matter, I am obviously associating the idea of the generalist federal judiciary with the constitutional idea of the separation of powers. This association has another facet. The idea that the judiciary is a check on the other branches of government derives not only from the power of the courts to invalidate legislation as unconstitutional but also

51. This analysis is developed in Posner, *Economics, Politics, and the Reading of Statutes and Constitutions*, 49 U. CHI. L. REV. 263, 272-73 (1982).

52. See THE FEDERALIST No. 10, at 16 (J. Madison) (R. Fairfield 2d ed. 1966).

from the judiciary's role as an intermediary between the coercive powers of the state and their application to the individual citizen.⁵³ The federal courts play their role as a buffer between the political branches and the citizen more effectively when they are composed of generalists than when they are composed of specialists. A generalist court provides some insulation; a specialist court is apt to be a superconductor. Specialists are more likely than generalists to identify with the goals of a government program, since the program is the focus of their career. They may therefore see their function as one of enforcing the law in a vigorous rather than a tempered fashion. In this respect the case for a generalist federal judiciary resembles the case for the jury—not despite, but because of, its lack of expertness.

An earlier qualification must be repeated: the generalist court will be more faithful to the original spirit of an enactment, the specialist court to the current legislative and executive will. But these fidelities are of a different order. The specialist is more faithful to the current goals of a program than the generalist because the specialist is subject to greater control by the political branches. There is no mystery about *his* incentives. But the generalist judge, if faithful to the original goals of a statutory program at all, is faithful as a matter of conscience rather than compulsion; and a desire to temper the harshness of the law, to make legislation more civilized, or sometimes even to thwart the popular will, may, rightly or wrongly, be a part of a judge's conscience and may therefore operate to blunt the impact of special interest groups on law.

3. Although, as the examples of the Tax Court and the Federal Trade Commission show, it is not inevitable that a specialist court will be a monopolist of its field, that is the tendency and it is not accidental. The more confined the jurisdiction of a court, the fewer judges it needs (other things being equal) to do its work; and if only a few judges are needed, the economies of specialization will be reduced if there is more than one court.

Judicial monopoly has two effects. First, it reduces diversity of ideas and approaches—what in other contexts has been called “yardstick competition.” Of course, the federal courts of appeals do not compete directly with each other any more than the state supreme courts do, but they compete indirectly, by providing varied responses to common problems. If two circuits or two states are in conflict on a

53. See *id.* No. 78, at 226, 231-32 (A. Hamilton).

question, other circuits or other states benefit from the clash of views—the (literally) competing alternatives. The circuits as well as the states are laboratories for social, including judicial, experimentation, and a judicial monopoly of a field of federal law eliminates competition in that field.

Second, judicial monopoly increases the concentration of government power. The federal court system is extremely diffuse, notwithstanding the supremacy of the Supreme Court; more than 600 Article III judges play some role in administering such national programs as Medicaid and Taft-Hartley and the Sherman Act. Specialization by subject matter would thus bring about a greater concentration of judicial power even if the individual judge of a specialized court had the identical incentives and outlook of the average generalist judge.

4. A related point is that specialization reduces the geographical diversity of the federal judiciary. We think of the federal court system as a unitary national system, but it is very rare⁵⁴ that someone is appointed to the district court who is not a resident, usually a long-time resident, of the district, or that someone is appointed to the court of appeals who is not a resident not only of the circuit, but of the particular state of the circuit to which the judgeship has been informally allocated. Specialized federal appellate courts, in contrast, will almost certainly be Washington courts. This is a corollary to my last point and, more grandly, to Adam Smith's proposition that the division of labor is limited by the extent of the market.⁵⁵ There are not enough antitrust appeals to justify a specialized court of antitrust appeals in every district, every state, or even every circuit. The way to get around this problem, and make specialization pay, is to broaden the market, make it nationwide. It is not logically necessary, but it is highly likely, that the site of a national court will not be Akron, or Janesville, or Miami, but Washington, D.C. This means that the members of specialized federal courts will be appointed with much less attention to regional diversity than are the members of the generalist federal judiciary. And because there are strongly marked political differences among the nation's states and regions, a departure from geographical diversification as a principle of federal judicial selection implies once again an increase in the concentration of governmental power.

54. Though not unlawful: although district and circuit judges, other than in the D.C. Circuit, are required to reside in the district or circuit, respectively, to which they are appointed, see 28 U.S.C. §§ 44(c), 134(b) (1976), they can be new residents.

55. A. SMITH, *supra* note 38, at 17-21.

5. Judicial specialization reduces the cross-pollination of legal ideas. If you think that the basic concepts of antitrust law are totally different from the basic concepts of tort law, you will not be troubled by this. But if you think there is a general legal culture that enables those broadly immersed in it to enrich one field with insights from another, you will see this as still another drawback of specialization; you will see this as a case where—to use some economic jargon—the existence of complementarities across different activities reduces the gains from specializing in one of the activities. That is my view. What Holmes said almost fifty years ago on the matter is still valid, though federal law is more complex today:

Every group, and even almost every individual when he has acquired a definite mode of thought, gets a more or less special terminology which it takes time for an outsider to live into. Having to listen to arguments, now about railroad business, now about a patent, now about an admiralty case, now about mining law and so on, a thousand times I have thought that I was hopelessly stupid and as many have found that when I got hold of the language there was no such thing as a difficult case. There are plenty of cases about which one doubts, and may doubt forever, as the premises for reasoning are not exact, but all the cases when you have walked up and seized the lion's skin come uncovered and show the old donkey of a question of law, like all the rest.⁵⁶

6. Specialization is a source of potentially serious boundary problems. Cases that involve the review of administrative action involve, almost by definition, single issues, or at least issues within a single branch of law—the branch administered by the agency in question. You cannot join with a request for social security disability benefits a tort claim against the person who disabled you. But in many areas of law complaints cutting across a variety of fields are the norm rather than the exception and those cases are difficult to deal with in a system of specialized courts. Either one specialized court is assigned the whole case, producing underspecialization with respect to those issues that come from a different field of law, or the case is split between different courts, with an obvious loss of judicial economy.

This point casts a further sidelight on the debate over abolition of the diversity jurisdiction. Even if diversity jurisdiction is abolished, the federal courts will still have to decide issues of state law—in pendent

56. Letter to John C.H. Wu (May 14, 1923), *reprinted in* O.W. HOLMES, JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 163-64 (H. Shriver ed. 1936).

and ancillary jurisdiction cases, in cases under the federal common law where state law is selected as the rule of decision, in cases under the Federal Tort Claims Act (which makes state tort law the rule of decision), in many tax and bankruptcy cases, and so on. Yet their ability to decide issues of state law intelligently will be impaired unless their caseload includes some critical mass of state law questions so that their involvement with state law is more than merely sporadic; it is the diversity jurisdiction, I believe, that creates the critical mass. In so arguing I am of course conceding the benefits of specialization. But as I said earlier I do not reject all specialization; it is a question of the right amount.

7. My last point, a humble but practical one, is that a generalist judiciary can cope better with unforeseen changes in the caseload mix than a specialized judiciary can. Obviously the federal appellate caseload as a whole changes less from year to year than the components of that caseload. Hence if each component were assigned to a separate court it would be more difficult to match supply to demand. An unexpected increase in the number of federal criminal appeals in one year does not impose a great strain on the courts of appeals, because it is offset, to some extent at least, by unexpected decreases in other components of the courts' caseload (e.g., antitrust). But if we had specialized federal criminal appeals courts, a sudden increase in the number of those appeals could put a big strain on those courts because there would be no offsets, while a sudden decrease could leave many of its judges underemployed. And altering the number of judges is not a feasible method of coping with short-term caseload fluctuations. The process of creating new federal judgeships and then of filling the newly created vacancies is a painfully slow one. Reducing the number of federal judges is a very slow process too; it can be done only through attrition, because of the tenure provisions of article III. It is slow even in article I courts, because judges of those courts are appointed for long fixed terms. It has not yet been suggested that a good way to match supply to demand is to allow judges to be laid off when their services are not needed, like factory workers or airline pilots, to be recalled when demand picks up.

The problem of matching supply to demand is not merely theoretical. There is a widespread perception that the judges of the Court of Claims and the Court of Customs and Patent Appeals have not had enough work to do in recent years, at least as measured by current norms of judicial busyness. This is one of the unspoken reasons behind

the enlarged jurisdiction of the new Federal Circuit court. At the same time it is clear that the bankruptcy judges are critically overloaded, because of the unexpectedly large increase in the number of bankruptcy filings in the last couple of years.⁵⁷ The problem of supply-demand imbalance has been less serious in the courts of appeals, because of the diverse character of their caseload.

C. THE D.C. CIRCUIT VENUE PROPOSAL

Though at times the movement toward greater judicial specialization seems irresistible, I want to conclude my discussion of judicial specialization with a brief glance at a very interesting current proposal, related to point number four in the previous section (geographical diversity), that goes against the grain. That is the proposal to alter the venue provisions of statutes granting rights to judicial review of federal administrative decisions to make it more difficult to get such decisions reviewed in the U.S. Court of Appeals for the District of Columbia Circuit.⁵⁸ Over the years, that court has become almost a specialized court of administrative agency review,⁵⁹ and its location in Washington, D.C., a place that has no Senators, has increased the Presidential appointments power over the court. Dealing as it does with more controversial subject matter than the Tax Court or the former Court of Claims and Court of Customs and Patent Appeals, it can be thought of as an experiment in changing the federal judiciary into a series of specialized courts, located, one would expect, mainly or entirely in Washington. And it is an experiment that, it seems to me, yields results supportive of my thesis, though an adequate analysis of the D.C. Circuit would carry me far beyond the limits of this paper.

There is a widespread impression that the D.C. Circuit is more ideological than any of the other federal courts of appeals. If this is true, it is partly due, I would conjecture, to the fact that the diffusive forces of Senatorial consent and geographical diversity that are attenuated in its composition. Another cause may be that Washington both attracts people with a taste for politics and awakens the political tastes of people who came there for other reasons, the atmosphere of the city

57. In fiscal year 1979, there were 226,476 bankruptcy filings. In fiscal year 1981, that number increased to 519,063. See 1981 ANN. REP., *supra* note 1, at 132.

58. The proposal would bar suit against federal agencies in the place where the defendant resides or the cause of action arose unless the agency action or inaction would substantially affect residents of that judicial district. See Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. CHI. L. REV. 976, 990-91 (1982). For critical discussion of this proposal, see Sunstein, *supra* note 58, at 991-1000.

59. See 1981 ANN. REP., *supra* note 1, at 351, 359.

being so obsessively political. But the most important factor, I suspect, is that the D.C. Circuit has tended—by its own report—to see its responsibility in relation to the administrative agencies it reviews as being not to act as a buffer between the agencies and the citizens they are trying to coerce, but to spur the agencies to regulate more effectively; it is not holding the horses back, but lashing them forward.⁶⁰ This makes it possible to understand not only why, as noted by Professor Sunstein, environmental activists strongly oppose the proposed venue changes,⁶¹ but also why it is possible to mobilize an interest group (the “environmentalists”) on a seemingly technical issue of federal jurisdiction in relation to the D.C. Circuit. This would be more difficult to do in regard to the other circuits, with their more diverse “clientele.”

D. IMPLICATIONS OF THE ANALYSIS FOR OTHER SOLUTIONS TO THE CASELOAD PROBLEM

I want to conclude my discussion of specialization by noting two implications of specialization for points made in earlier parts of this paper. First, increasing the number of court of appeals judges, a solution discussed and rejected in Part I, becomes a little more attractive viewed against the backdrop of the discussion of specialization in this part. If you are concerned with the concentration of governmental powers in the hands of a small number of people, and if you agree (as you must if you are realistic) that federal court of appeals judges exercise such powers, then you may see an increase in the number of such judges (there are only 132 authorized circuit judgeships today)⁶² as a positive step.

Second, the practice, curious to nonlawyers, of employing as their law clerks lawyers who have just graduated from law school, rather than more seasoned practitioners, can I think be explained by reference to the generality of the federal jurisdiction and the much more specialized character of legal practice. A lawyer who knows one field of federal law well, but the others not well at all, is of relatively little value to

60. For example, the D.C. Circuit sympathetically reviews claims of agency inaction. *See Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1979) (en banc) (per curiam) (HEW required to take action regarding federal assistance to segregated school systems); *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971) (EPA required to take formal action on question of banning DDT). *See generally* Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982).

61. *See* Sunstein, *supra* note 58, at 987-90.

62. *See* 28 U.S.C. § 44(a) (Supp. IV 1980). Counting the judges of the new United States Court of Appeals for the Federal Circuit, there are 144 authorized circuit judgeships. *See* Federal Courts Improvement Act of 1982, Pub. L. 97-164, § 102(a), 96 Stat. 25, 25 (1982).

a federal judge, compared to a less experienced lawyer who knows many fields of federal law pretty well. Only recent graduates are likely to fill this bill, for once they have practiced for a few years they will have forgotten much of what they learned in law school outside of the particular field in which they happen to be specializing as practitioners. I would predict, therefore, that if we moved to a system of specialized courts we would tend to see a different type of law clerk—a more experienced practitioner, functioning more like an assistant judge than a judicial assistant. We would see, in other words, the emergence of a more bureaucratic, more conventionally hierarchical, judicial system—carrying us still further away from the traditional Anglo-American conception of judging.

CONCLUSION

The federal courts of appeals face a caseload crisis and every circuit judge, even a new one, has a responsibility to contribute his thinking on ways of dealing with the crisis, a responsibility I have tried to discharge in this paper. Unfortunately, my findings are negative. I believe that neither increased delegation of the judicial function to law clerks and other staff nor increased judicial specialization is a good response to the crisis, and the idea with which I began, that of simply freezing the number of federal district judgeships, is at best a stopgap measure. It is apparent that much more thought must be given—and quickly, too—to fundamental reform, which will involve changing the incentives to litigate that face parties and their counsel and moving the boundaries between state and federal judicial responsibilities in such areas as postconviction remedies.

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